Genine

Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

Robert K. Corbin

May 12, 1980

INTERAGENCY
The Honorable Jerry Everall
Arizona State Representative
House Wing, State Capitol
Phoenix, AZ 85007

Re: I80-070 (R80-071)

Dear Representative Everall:

This is in response to your opinion request dated March 4, 1980, in which you asked whether the State Board of Directors for Community Colleges of Arizona may delegate its power to lease real property to a community college district board of governors by making the district board its agent.

A.R.S. § 15-659 provides in pertinent part:

> C. The state board shall determine the location within the district of the community college and purchase, receive, hold, make and take leases of and sell real property for the benefit of the state and for the use of the community colleges under its jurisdiction.

In implementing this provision, the State Board has adopted A.C.R.R. R7-1-82 providing that:

> B. * * *
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> 17. District governing boards shall act as agents of the State Community College Board in the leasing of real property. The local district governing board will furnish a copy of the lease to the State Board immediately upon execution. The district governing board will also provide certification that the facility leased by them complies with the State Fire Marshal's Code and A.R.S. § 34-401 et seq.

While we have found no Arizona cases dealing directly with the issue of delegation by a state agency to another agency or political subdivision, in Board of Education v. Scottsdale

Education Ass'n, 17 Ariz.App. 504, 511, 498 P.2d 578, 585, vacated on other grounds, 109 Ariz. 342, 509 P.2d 612 (1973), the Arizona Court of Appeals stated:

> . . . [W]here, as in Arizona, the power to manage and control the affairs of the school district lies exclusively with the board of trustees, except where that power has been by specific legislation granted to someone else, the board may not delegate that authority without specific legislative authorization.[1]

Cases addressing the problem of delegation by an administrative agency generally involve a question of subdelegation, i.e., the transmission of authority from the heads of agencies to their subordinates. The Arizona Court of Appeals has recently considered the issue of subdelegation in Peck v. Board of Education, No. 1 CA-CIV 4535 (Ariz. App., April 22, 1980). The court held that a school district governing board could not delegate its discretionary power to determine whether to renew the contract of a probationary teacher to the district superintendent.

Both Board of Education v. Scottsdale Education Ass'n, supra, and Peck v. Board of Education are consistent with the general rule expressed in several jurisdictions that, absent express legislation directing otherwise, authority delegated by the Legislature to a board or agency cannot be further subdelegated unless the subdelegation involves merely a ministerial power or duty.[2]

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1. Although the Court of Appeals was not addressing a situation involving delegation by one state agency to another state agency, but rather with the issue of whether a school district board could delegate its authority to hire and fire teachers by entering into a collective bargaining agreement with a teachers' organization, we believe this language indicative of the Court's attitude towards delegation generally.

2. See, e.g., Hansen v. Colorado School of Mines, 599 P.2d 928 (Colo.App. 1979); Harper College Faculty Senate v. Board of Trustees, 51 Ill.App.3d 433, 366 N.E.2d 999 (1977); Board of Regents v. Exon, 199 Neb. 146, 256 N.W.2d 330 (1977). There is a minority viewpoint permitting subdelegation without specific legislative authorization. See Montegue v. Board of Education, 402 S.W.2d 94 (Ky. 1966); State ex rel Anderson v. Bellows, 179 N.W.2d 307 (1970); 1 Davis, Administrative Law Treatise, §§ 3:16, 3:17 (2d ed. 1978).

The rationale for this general rule has been stated by the Oregon Supreme Court in In Re Portland General Electric Co., 277 Ore. 447, 469-70, 561 P.2d 154, 168 (1977), where the court stated:

> State agencies, unlike federal agencies, are often composed of private citizens who are given crucial governmental responsibilities on a part-time basis. . . . It is doubly important that such non-professional agency heads not think of their staff as the agency and themselves as a reviewing body, but rather understand clearly that it is their personal responsibility to determine the facts and to set and apply the standards entrusted to them by the act.

The rationale stated in In Re Portland General Electric Co., supra, is also applicable to an attempt to delegate responsibilities to another agency. The board to whom authority has been delegated by the Legislature should assume responsibility for exercising this authority pursuant to legislative guidelines. A state agency may not delegate its discretionary duties to subordinates or other agencies. Unless the agency is delegating purely ministerial functions, the responsibility to act lies with the agency given power by the Legislature. We believe that the language in Board of Education v. Scottsdale Education Ass'n, supra, and Peck v. Board of Education, supra, support this conclusion. We therefore must determine whether the State Board of Directors for Community Colleges has delegated a purely ministerial power to district governing boards or whether it has delegated a discretionary function.

Whether an act is discretionary or ministerial is a factual determination. However, the Arizona courts have provided guidelines in making this determination. In describing what constitutes a ministerial act, the Arizona Supreme Court has held:

> An act is ministerial where the law requiring it to be performed prescribes the time, manner, and occasion of its performance with such certainty that nothing remains for judgment or discretion.
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> Magma Copper Co. v. Arizona State Tax Commission, 67 Ariz. 77, 85, 191 P.2d 169, 174 (1948).

In El Paso Nat. Gas Co. v. State, 123 Ariz. 219, 599 P.2d 175, 177 (1979), the Arizona Supreme Court stated that "ministerial acts leave nothing to discretion for the duty and manner of performance are described with certainty."

Additional guidance comes from the following definition of "ministerial duty" recognized by the Arizona Court of Appeals:

> . . . [W]hen it is in obedience to the mandate of legal authority and the act is to be performed in a prescribed manner without the officer's judgment as to the propriety of the act.
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> Industrial Commission v. Superior Court, 5 Ariz.App. 100, 104, 423 P.2d 375, 379 (1967).

A.C.R.R. R7-1-82.B.17 permits district governing boards to determine what property it will lease, from whom it will lease the property, the rental it will pay pursuant to the lease, and the length of the time of the lease. We cannot state that this is purely a ministerial function but is rather a grant of broad discretionary authority to the district governing boards. We therefore conclude that the State Board has impermissibly delegated its authority to enter into leases to the district governing boards.[3]

Sincerely,

Bob Corbin

BOB CORBIN
Attorney General

BC:MAP:lfc

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3. This does not mean that the State Board of Directors for Community Colleges may not empower the district boards with the authority to carry out the ministerial functions necessary to complete a lease agreement. It is the decision to enter into the lease which must be determined by the State Board. It is not necessary, for example, that the State Board sign all leases. In State v. King Co., 74 Wash.2d 673, 446 P.2d 193 (1968), the Washington Supreme Court dealt with this specific issue and determined that the resolution of the State Board of Community College Education which authorized a community college district to acquire specific property was not an improper delegation of the Board's power of eminent domain. The court explained that ". . . the state board simply authorized the local board to carry out the mechanical and procedural functions necessary for the state board to obtain title to the desired land." 446 P.2d at 195.